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In The
Supreme Court of the United States
October Term, 1996

ATLANTIC COAST LIFE INS. CO.
AND ATLANTIC COAST LIFE INS.
CO. EMPLOYEE BENEFIT PLAN,

Petitioners,

vs.

PAYDEN SHAW AND JUANITA SHAW,

Respondents.

On Joint Petition for Writ of Certiorari
To the South Carolina Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a claimant for benefits due under the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"), 29 U.S.C. § 1132(a)(1)(B), have a right to a jury trial?

2. When a state court exercises its concurrent jurisdiction to resolve a federal question created by a claim for benefits due under ERISA, 29 U.S.C. § 1132(a)(1)(B), can it apply state law rather than federal common law created by the courts of appeals to determine rights arising under ERISA?

LIST OF PARTIES

The parties to the proceeding below were the Petitioners, Atlantic Coast Life Insurance Company and Atlantic Coast Life Insurance Company Employee Benefit Plan, and the Respondents, Payden and Juanita Shaw. Neither of the Petitioners has parent companies or nonwholly owned subsidiaries.

Blue Cross and Blue Shield of South Carolina filed a Motion for Permission to File an *Amicus Curiae* Brief in Support of the Petition for Rehearing, but its motion was denied by the South Carolina Court of Appeals on May 23, 1996. (App. 5-1.)

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ATLANTIC COAST LIFE INS. CO.
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CO. EMPLOYEE BENEFIT PLAN,

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PAYDEN SHAW AND JUANITA SHAW,

Respondents.

On Joint Petition for Writ of Certiorari
To the South Carolina Court of Appeals

The Petitioners, Atlantic Coast Life Insurance Company and Atlantic Coast Life Insurance Company Employee Benefit Plan, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the South Carolina Court of Appeals, entered in the above-entitled proceeding on March 18, 1996.

OPINIONS BELOW

The opinion and judgment of the South Carolina Court of Appeals dated March 18, 1996, is reported at 470 S.E.2d 382 (S.C. 1996) and is reprinted in the Appendix hereto, at App. 1-1 to 1-9, *infra*. The Petitioners' Joint Petition for Rehearing was denied by the South Carolina Court of Appeals on May 23, 1996. On the same date, the South Carolina Court of Appeals denied Blue Cross and Blue

Shield of South Carolina's Motion for Permission to File an *Amicus Curiae* Brief in Support of the Petition for Rehearing. (App. 5-1.)

On November 8, 1996, the Supreme Court of South Carolina denied the Petitioners' Joint Petition for Writ of Certiorari to the South Carolina Court of Appeals. (App. 6-1.)

The opinion and judgment of the Honorable Charles W. Whetstone, Jr. of the Court of Common Pleas, who presided at Petitioners' Motions to Transfer the Case to the Non-jury Roster, was issued January 19, 1995, but it was not reported. It is reprinted in the Appendix, at App. 2-1 to 2-2, *infra*.

JURISDICTION

Petitioners seek review of the opinion and judgment of the South Carolina Court of Appeals, which was entered on March 18, 1996, and which affirmed the opinion of the Court of Common Pleas for Georgetown County issued by the Honorable Charles W. Whetstone, Jr. on January 19, 1995. Petitioners' subsequent Joint Petition for Rehearing was denied on May 23, 1996. The Supreme Court of South Carolina denied the Petitioners' Joint Petition for Writ of Certiorari on November 8, 1996. The Supreme Court of the United States has jurisdiction to review cases from state courts by virtue of 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS

- U.S. CONST. art. III, § 2.
- U.S. CONST. art. VI.
- U.S. CONST. amend. VII.
- 29 U.S.C. § 1132(a)(1)(B), also known as ERISA § 502(a)(1)(B).

- 29 U.S.C. § 1132(e)(1), also known as ERISA § 502(e)(1).
- 29 U.S.C. § 1144, also known as ERISA § 514.

The text of these provisions is reprinted in the Appendix hereto, beginning at App. 7-1, *infra*.

STATEMENT OF THE CASE

Since the inception of ERISA, federal district courts have generally been on the front line in resolving claims for ERISA trust benefits between an employee and/or the employee's dependent and their ERISA plan. Experience has allowed federal courts to reach a consensus on many of the issues implicated by ERISA, including the right to a jury trial. Although this Court has not spoken on the issue directly, its opinions on the standards of review and the equitable statutory remedies available under ERISA have led the federal courts of appeals to overwhelmingly hold that there is no right to a jury trial in an ERISA claim for benefits — a claim under 29 U.S.C. § 1132(a)(1)(B).

As the amount of ERISA litigation has increased over the years, state courts have increasingly had opportunities to exercise their concurrent power under ERISA to hear 29 U.S.C. § 1132(a)(1)(B) claims. In doing so, many states have had to determine whether ERISA affords a claimant the right to a jury trial. Many states' highest courts are directing ERISA cases to be tried by a jury based upon state law and this Court's decision in *Firestone Tire & Rubber Company v. Bruch*, 489 U.S. 101 (1989), which they have misstated and misapplied for the proposition that ERISA actions are essentially actions for breach of contract. As most states allow trial by jury for breach of contract actions, likewise, the states are now allowing jury trials in ERISA actions tried in state courts.

This is one such case.

This action was commenced in the Court of Common Pleas, State of South Carolina when Respondents' filed and served a Summons and Complaint on April 20, 1993. (App. 14-1 to 14-6) In their Complaint, the Respondents expressly cited 29 U.S.C. § 1132(a) and sought to recover ERISA benefits from a self-funded employee welfare benefit plan established by the Employer. The Complaint named only one defendant, Petitioner Atlantic Coast Life Insurance Company (hereinafter "the Employer"), which was the employer of one of the Respondents, Payden Shaw, whose wife, Juanita Shaw, the other Respondent, was seeking benefits for medical services.

The body of the Complaint did not contain a demand for a jury trial; however, on the face of the Complaint filed with the Court was typed the words "Jury," and "Insurance Claim," in a typeface which did not match the type of the body of the Complaint. (App. 14-3.)

The Employer denies having received a copy of the Complaint with a jury demand. The Employer filed and served a timely Answer on May 20, 1993, and asserted as a second defense that the Respondents had failed to join an indispensable party — the Atlantic Coast Life Insurance Company Employee Benefit Plan (hereinafter "the Plan").

Thereafter, the Employer discovered that the case was pending on the jury trial roster, and on July 22, 1994, it filed a Motion to Transfer the Case to the Non-jury Roster on the ground that ERISA statutory remedies are equitable, not legal, so the Respondents were not entitled to a jury trial. (App. 12-1.) Before that motion was heard, an Order directing the addition of the Plan as an additional defendant was signed on August 30, 1994, by the Honorable David H. Maring, Sr. (App. 3-1.)

The Respondents filed and served an Amended Summons and an Amended Complaint on September 27, 1994, adding the Plan as an additional defendant. (App.

15-1 to 15-6.) The Amended Complaint contained no request for a jury trial, nor was any reference made to "jury" on the face of the Amended Summons or Amended Complaint. (App. 15-1, 15-3.)

Timely answers to the Amended Complaint were filed and served by both Petitioners. (App. 16-1 to 17-6.) Both Petitioners asserted that the arbitrary and capricious standard of review was applicable to this case as the Plan granted the plan administrator discretion to interpret the Plan. (App. 16-7, 17-5.)

On January 9, 1995, the Plan filed a Motion to Transfer the Case to the Non-jury Roster after the case appeared on the jury trial roster. (App. 13-1.)

Both the Employer and the Plan's Motions to Transfer the Case to the Non-jury roster were heard by the Honorable Charles W. Whetstone, Jr. of the Court of Common Pleas. Both the Petitioners argued that an action to recover ERISA trust benefits is equitable and, thus, there is no right to a jury trial. (App. 12-1 to 13-2.) The Petitioners also argued that the Respondents had failed to make a timely demand for a jury trial. (App. 12-2.) In an Order dated January 19, 1995, Judge Whetstone denied both motions after finding that beneath the "seemingly equitable issue of employee medical benefits and right," there lurked a basic contractual issue of whether the Plan afforded coverage to the Respondents. (App. 2-2.)

Timely notices of appeal by the Employer and the Plan were filed and served on January 20, 1995. On January 23, 1995, the Supreme Court of South Carolina notified the parties that the appeals of the Employer and the Plan had been consolidated, and that the Employer had been designated as secondary Appellant and the Plan as primary Appellant.

The appeal was heard by the South Carolina Court of Appeals on January 9, 1996. On March 18, 1996, that

court filed Opinion Number 2488 affirming the trial court's decision. (App. 1-1 to 1-9.) In its opinion, the South Carolina Court of Appeals found that the Respondents had timely demanded a jury trial and that the trial court correctly ordered a jury trial in this ERISA claim for benefits. (App. 1-4.) The court acknowledged that "[m]ost" federal courts have denied jury trials under ERISA after analyzing the benefit plans as trusts. (App. 1-4.) Nonetheless, the court followed the approach of "most" other state courts exercising their concurrent jurisdiction under ERISA and analogized an ERISA claim for benefits-due to a pre-ERISA breach of contract claim. (App. 1-5, 1-9.) The court found that this Court's decision in *Firestone*, 489 U.S. 101, had undermined the primary rationale for federal courts of appeals' refusal to grant jury trials in ERISA lawsuits by prescribing a de novo standard of review for some ERISA cases, and then the court adopted a Fourth Circuit federal district court's analysis of the *Firestone* opinion:

> The Supreme Court has thus recast some ERISA claims as legal, without expressly so holding. Despite trust law language in ERISA and the Supreme Court cases, traditional trust law does not afford de novo review, compensatory damages, or punitive damages. The Supreme Court is following its analogy of contract law actions through to afford legal remedies. The logical conclusion is that, despite being couched within a statutory scheme which mirrors trust law, some ERISA claims and remedies are legal ones and thus should be afforded a jury trial.

(App. 1-8 to 1-9 *citing with approval Vaughn v. Owen Steel Co., Inc.*, 871 F. Supp. 247 (D.S.C. 1994).)

After deciding that this lawsuit was "essentially an action for breach of contract . . . . despite its ERISA label," the South Carolina Court of Appeals applied South Carolina law and held that the case was triable by a jury regardless of the applicable standard of review, which that court

acknowledged in this case was probably abuse of discretion:

> In this case it appears from the pleadings that, based upon the trustee's discretionary authority, the jury may be required to decide whether the denial of benefits was arbitrary and capricious.

(App. 1-8 n.3.)

Subsequently, the Employer and the Plan filed a Joint Petition for Rehearing, which was denied by the South Carolina Court of Appeals on May 23, 1996. (App. 4-1.)

On November 8, 1996, the Supreme Court of South Carolina denied a joint petition by the Employer and the Plan for writ of certiorari. (App. 6-1.)

STAGE AT WHICH FEDERAL QUESTION WAS RAISED

ERISA's application to this case was first raised below in the Respondents' original Complaint, which was brought in state court under that court's concurrent jurisdiction to hear ERISA claims for benefits. (App. 14-3.) Petitioners raised ERISA as the grounds for transferring the case to the non-jury roster in their Motions to Transfer Case to Non-jury Roster. (App. 12-1 to 13-2.) Thereafter, the trial court acknowledged ERISA's application, but refused to grant the Employer and the Plan's Motions to Transfer the Case to the Non-jury Roster. (App. 2-2.)

The state court's erroneous application of state law and interpretation of federal precedent to determine the mode of trial in an ERISA claim for benefits was presented and argued before the South Carolina Court of Appeals. That court stated as the "key issue on appeal," "whether

the Shaws, seeking recovery of benefits pursuant to 29 U.S.C.A. §1132(a)(1)(B)" have a right to trial by jury. (App. 1-4.) The South Carolina Court of Appeals upheld the trial court's ruling. (App. 1-4.) The issue was again presented to the South Carolina Court of Appeals in a Joint Petition for Rehearing, which was denied. (App. 4-1.) The Supreme Court of South Carolina denied the Joint Petition for Writ of Certiorari to the Court of Appeals, which also questioned the trial court's exercise of its concurrent jurisdiction under ERISA. (App. 6-1.)

REASONS FOR GRANTING THE WRIT

I.

By approving a jury trial in an ERISA claim for benefits, the South Carolina Court of Appeals has decided an important federal question in a way that conflicts in principle with decisions of this Court.

The South Carolina Court of Appeals' application of state law to grant a jury trial in an ERISA claim for benefits conflicts in principle with decisions of this Court and, thus, presents a compelling reason for granting certiorari. ERISA does not expressly address the applicable mode of trial. *Compare* The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et. seq. with* Civil Rights Act of 1991, § 102, 42 U.S.C. § 1981a(c)(1) (Supp. 1995) (Congress recently provided an explicit right to a jury trial when a plaintiff requests compensatory and punitive damages in a Title VII action). Nor has this Court yet addressed the right to a jury trial in a claim for benefits-due under ERISA. However, in interpreting ERISA, this Court has repeatedly articulated principles which are inconsistent with jury trial. As this Court is the ultimate authority in interpreting federal statutes, including ERISA, state courts are bound by those interpretations when they exercise their concurrent

jurisdiction power to hear claims for benefits arising under ERISA.

The South Carolina Court of Appeals' affirmation of a jury trial in an ERISA claim for benefits conflicts in principle with this Court's ruling in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1990). The United States Constitution provides for jury trial "[i]n Suits at common law, where the value in controversy exceeds twenty dollars." U.S. Const. amend. VII. In *Terry*, the Court enunciated the proper analysis for determining the mode of trial under a federal statute which does not explicitly provide for mode of trial — only causes of action arising out of law not equity engender a Seventh Amendment right to trial by jury. The three-part *Terry* test instructs courts to: (1) compare the present statutory action to 18th-century actions in the courts of England before the merger of courts of law and equity; (2) determine whether the nature of the remedies afforded are legal or equitable; and, (3) to assess whether "the issues [presented by the claim] are typical grist for the jury's judgment." *See Terry*, 494 U.S. 558, 565 (1990); *Curtis v. Loether*, 415 U.S. 189 (1974). In analyzing whether ERISA includes an implied right to a jury trial in 1132(a)(1)(B) actions pursuant to the Seventh Amendment of the United States Constitution, the South Carolina Court of Appeals should have applied the *Terry* test and found a jury trial of an ERISA claim for benefits-due unsupportable.

The first prong of the *Terry* test is inapplicable because ERISA did not exist prior to 1974. *See Hatco Corp. v. W. R. Grace & Co.-Conn.*, 59 F.3d 400 (3d Cir. 1995) (applying *Terry* and finding no right to a jury trial under CERCLA, a federal statute which is silent as to the mode of trial); *Martin v. Telectronics Pacing, Syst., Inc.*, 70 F.3d 39 (6th Cir. 1995) (holding no right to a jury trial under MPA). Where Congress, in its statutory scheme, does not address the trial by jury right, such silence indicates an intention that suits driven by the statute are equitable. *Brown v. Retirement*

Comm. of Briggs and Stratton, 797 F.2d 521, 527 (7th Cir. 1986), *cert denied*, 479 U.S. 1094 (1987).

The second prong of the *Terry* test, determining the character of the available remedies, is outcome-determinative. *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989). If the remedies afforded are equitable in nature, then the whole claim is characterized as equitable rather than legal and a claimant under the Act is not entitled to a jury trial. *Terry*, 494 U.S. 558, 570-574; *see also* Denise Drake Clemow and Lisa Hund Lattan, *ERISA Section 510 Claims: No Right to a Jury Trial Can Be Found*, 73 Neb. L.R. 756, 771 (1994). The nature of an action brought under 29 U.S.C. § 1132(a)(1)(B), like the instant one, is for the enforcement of the ERISA plan. Although the Respondents assert that they are claiming damages (R. p. 6), in effect they are claiming benefits from a trust established pursuant to an ERISA Plan. That the statutory remedy sought under a 29 U.S.C. 1132(a)(1)(B) claim is money does not mean that the remedy is legal relief. *Terry*, 494 U.S. at 570; *Curtis*, 415 U.S. at 189; *Granfinanciera*, 492 U.S. at 86 n. 9. A court could award back-benefits due and order the Plan to pay continuing benefit claims. Both of these remedies are traditionally equitable forms of relief. *See Tull v. United States*, 481 U.S. 412, 417-18 (1987) (stating that a monetary award incidental to or intertwined with injunctive relief may be equitable). Thus, because the nature of the statutory remedies afforded under 29 U.S.C. § 1132(a)(1)(B) are equitable, no right to a jury trial attaches.

The state court below should have applied the second prong of *Terry* and found this Court's characterization of ERISA's remedies as arising out of statutory trust law to be binding. In analogizing this ERISA claim to a breach of contract action and allowing a jury trial, the South Carolina Court of Appeals has conflicted in principle with this Court's decision in *Firestone Tire & Rubber Company v. Bruch*, 489 U.S. 101, 110-111 (1989), which applied statutory trust law principles to determine that two standards of review were available in an ERISA claim for benefits.

The South Carolina Court of Appeals' allowance of a jury trial also conflicts in principle with this Court's binding decision in *Varity Corp. v. Howe*, 116 S.Ct. 1065 (1996), in which the Court confirmed that only equitable statutory remedies are available under ERISA. In 1996, the Court underscored the equitable nature of ERISA remedies by affirming the Eighth Circuit's holding that "[o]nly equitable relief, as opposed to damages, is available under ERISA . . . ." *Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir. 1994) *aff'd by Varity Corp. v. Howe*, 116 S.Ct. 1065 (1996). In *Varity*, a federal district court allowed a jury trial. After the jury awarded punitive damages, the court set aside that part of the verdict and rejected liability under breach of contract and fraudulent misrepresentation theories as those causes of action were preempted by ERISA. On the other claims, the district court allowed plaintiffs to elect compensatory damages of several million dollars or to elect only benefits-due plus reinstatement to the benefit plans from which they had been excluded. Not surprisingly, plaintiffs picked the money. The Eighth Circuit Court of Appeals reversed. "Such a judgment is legal relief, not equitable, and is not available under § 502(a)(3)." *Varity*, 36 F.3d 746 (8th Cir. 1994). However, the Eighth Circuit did allow the plaintiffs to elect the benefits-due and reinstatement option. It is this equitable statutory remedy which this Court affirmed.

Of even more importance is this Court's total disregard for the jury's verdict and findings in *Varity*. The Court made repeated reference to "the key facts, as found by the District Court after trial," to what "the District Court found," and to how the circuit court affirmed the "District Court's determinations." *Varity*, 111 S. Ct. 1065. In *Varity*, the Court relied exclusively on the trial court's findings without acknowledging the jury's findings. Thus, the Court implicitly recognized that jury trials are inappropriate in ERISA claims for statutory benefits.

The South Carolina Court of Appeals failed to acknowledge or apply the third *Terry* test prong. The third prong of the *Terry* test requires the court to determine if

the claims are ones typically resolved by juries. 494 U.S. at 565. While noting that this third factor is never "an independent basis for extending the right to a jury trial," it is relevant in determining "whether Congress has permissibly entrusted the resolution of certain disputes to an administrative agency or specialized court of equity, and whether jury trials would impair the functioning of the legislative scheme." *Id. quoting Granfinanciera*, 494 U.S. at 42. The foregoing discussion on the equitable nature of ERISA statutory remedies speaks to this section as does the later section on the standard of review. Both illustrate the inappropriateness of a jury trial in ERISA actions under 29 U.S.C. § 1132(a)(1)(B).

Equally in conflict with the state court's decision is this Court's binding decision in *Pilot Life v. Dedeaux*, 481 U.S. 41 (1987), in which the Court held that ERISA's statutory scheme was so pervasive that all state law claims and remedies are preempted by it. *See* 29 U.S.C. § 1144. As a result, ERISA claimants are left with only statutory trust law remedies, not contract or tort law remedies. Despite acknowledging the preemptive power of ERISA, the South Carolina Court of Appeals still erroneously analogized ERISA actions to state contract claims and found a right to a jury trial. (App. 1-9.) In 1987, this Court recognized that ERISA preempted all state claims — including but not limited to state contract law and bad faith actions — and replaced them with statutory remedies:

> The Solicitor General . . . argues that Congress clearly expressed an intent that the civil enforcement provisions of ERISA § 502(a) be the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits, and that varying state causes of action for claims within the scope of § 502(a) would pose an obstacle to the purposes and objectives of Congress . . . . We agree.
>
> . . . .

> In sum, the detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. "The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly." [Citation omitted.]
>
> The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive. This conclusion is fully confirmed by the legislative history of the civil enforcement provision.

Pilot Life, 481 U.S. at 52-54. Thus, even if benefits claims could have been considered "contractual" before ERISA, the fact that ERISA supplanted those causes of action with statutory causes of action against the trust plan for benefits makes pre-ERISA comparison irrelevant to whether or not a jury trial is available under ERISA.

Therefore, as the South Carolina Court of Appeals' allowance of a jury trial conflicts in principle with the foregoing decisions of the Supreme Court of the United States, the former must give way.

II.

With the South Carolina Court of Appeals' affirmation of a right to jury trial in an ERISA claim for benefits, the court has decided an important federal question in a way that directly conflicts with the decisions of every federal court of appeals which has considered the issue.

States exercising concurrent jurisdiction under ERISA are bound by federal law. In all matters of federal law, state courts owe obedience to the decisions of the Supreme Court of the United States and the decisions of the federal courts of appeals are persuasive authority on issues as yet unresolved. *See Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511 (1955); *Atlantic Coast Line R. Co. v. Wannamaker Chemical Co.*, 57 S.E.2d 311 (S.C. 1950); *Desmarais v. Joy Manuf. Co.*, 538 A.2d 1218 (N.H. 1988); *Evans v. W.E.A. Ins. Trust*, 361 N.W.2d 630 (Wis. 1985); 1B James W. Moore et al., *Moore's Federal Practice* § 0.402[1] (2d ed. 1985 & Cum. Supp. 1995-96). Federal decisional law interpreting a federal statute and delineating the rights and obligations thereunder is binding on state courts under the Supremacy Clause of the United States Constitution. U.S. Const. art. VI. When there is no federal statutory law to apply in ERISA litigation, "the federal common law" and not state law shall be applied. *Firestone*, 489 U.S. 101, 110 (Congress intended that the courts would develop a "federal common law of rights and obligations under ERISA"); *Reid v. Connecticut Gen. Life Ins. Co.*, 17 F.3d 1092 (8th Cir. 1994); *Singer v. Black & Decker Corp.*, 964 F.2d 1449 (4th Cir. 1992).

By choosing to overlook precedent of the federal circuit in which it sits, which is consistent with the decisions of every federal court of appeals which has considered the question, the South Carolina Court of Appeals has put itself in direct conflict with federal common law on the equitable nature of ERISA statutory remedies and jury trials under ERISA.

The South Carolina Court of Appeals' characterization of an ERISA claim for benefits as being akin to a contract action directly conflicts with federal courts of appeals' interpretations of the relief afforded by ERISA as being strictly statutory and equitable in nature. By the very language of ERISA, Congress limited the remedies available for violations of 29 U.S.C. § 1132(a)(1(B) by allowing a claimant "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B). In interpreting this provision, every federal court of appeals which has considered the question has concluded that only equitable remedies are afforded by ERISA. *Sullivan v. LTV Aerospace and Defense Co.*, 82 F.3d 1251 (2d Cir. 1996); *Cox v. Keystone Carbon Co.*, 894 F.2d 647 (3rd Cir. 1990), *cert. denied*, 498 U.S. 811; *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1006-07 (4th Cir. 1985); *Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1699 (1995); *Bair v. General Motors*, 895 F.2d 1094 (6th Cir. 1990); *Wardle v. Central States, Southeast and Southwest Areas Pension Fund*, 627 F.2d 820, 829-830 (7th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *Kirk v. Provident Life and Accident Ins. Co.*, 942 F.2d 504 (8th Cir. 1991); *Spinelli v. Gaughan*, 12 F.3d 853 (9th Cir. 1993); *Blake v. Unionmutual Stock Life Ins. Co. of America*, 906 F.2d. 1525, 1526-27 (11th Cir. 1990). A vast majority of the federal district courts have followed these federal courts of appeals' lead. *See e.g. Williams v. Unum Life Ins. Co. of America*, No. CIV. A. 96-799-A, 1996 WL 520333 (E.D. Va. Sept. 9, 1996); *Ellis v. Metropolitan Life Ins. Co.*, 919 F. Supp. 936 (E.D. Va. 1996); *Gentile v. John Hancock Mut. Life Ins. Co.*, No. CIV. A. 95-10222-NMG, 1997 WL 16792 (D. Mass. Jan. 8, 1997); *Stanford v. AT&T Corp.*, 927 F. Supp. 524 (D. Mass. 1996); *Abels v. Kaiser Alum. & Chem. Corp.*, 803 F. Supp. 1151 (S.D. W. Va. 1992); *Sprague v. General Motors Co.*, 804 F. Supp. 931 (E.D. Mich. 1992); *Pegg v. General Motors Co.*, 793 F. Supp. 284 (D. Kan. 1992); *contra Vaughn v. Owen Steel Co., Inc.*, 871 F. Supp. 247 (D.S.C. 1994) (holding that ERISA affords legal remedies).

Likewise, the South Carolina Court of Appeals' decision is in direct conflict with all of the federal courts of appeals which have determined that ERISA claimants under 29 U.S.C. § 1132(a)(1)(B) are not entitled to a jury trial. *Sullivan*, 82 F.3d 1251 (2d Cir. 1996); *Cox*, 894 F.2d 642 (3rd Cir. 1990); *Berry*, 761 F.2d 1003 (4th Cir. 1985); *Borst*, 36 F.3d 1308 (5th Cir. 1994); *Bair*, 895 F.2d 1094 (6th Cir. 1990); *Wardle*, 627 F.2d 820 (7th Cir. 1980); *Kirk*, 942 F.2d 504 (8th Cir. 1991); *Blake*, 906 F.2d. 1525 (11th Cir. 1990).

Despite the broad preemption powers Congress granted under ERISA, the South Carolina Court of Appeals has chosen to ignore overwhelming federal precedent and to apply its own laws and interpretation of federal precedent to determine the mode of trial afforded an ERISA claimant. Such a drastic departure from the federal common law created by the federal courts of appeals warrants this Court's attention.

III.

The South Carolina Court of Appeals has decided an important federal question under ERISA in a way that conflicts with other state courts of last resort.

The South Carolina Court of Appeals' opinion allowing a jury trial in an ERISA claim for benefits has created a confusing precedent which is likely to generate even further confusion among the states. To date, the state appellate courts which have considered this issue are split on whether to apply state or federal common law to determine mode of trial in an ERISA claim for benefits. *Compare Cramer v. Assoc. Life Ins. Co.*, 569 So.2d 533 (La. 1990) *and Compston v. Automanage*, 607 N.E.2d 485 (Ohio Ct. App. 1992) *and Elgin v. Great-West Life Assur. Co.*, 786 P.2d 1027 (Ariz. Ct. App. 1989) *and Director of Bur. of Labor Standards v. Fort*

Halifax Packing Co., 510 A.2d 1054 (Me. 1986) *and Ex parte Gurganus*, 603 So.2d 903 (Ala. 1992) *and Evans v. W.E.A. Ins. Trust*, 361 N.W.2d 630, 639 (Wis. 1985) *with Ex parte Metropolitan Life Ins. Co.*, 679 So.2d 686 (Ala. 1996) *and Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132 (Tex. 1994) *and Head v. Central Reserve Life of N. America Ins. Co.*, 845 P.2d 735, 739 (Mont. 1993) *and Walker v. Sperry & Hutchinson Co.*, 544 N.Y.S.2d 958 (1989) *and Overcash v. Blue Cross & Blue Shield*, 381 S.E.2d 330 (N.C. Ct. App. 1989) *and Fuller v. INA Life Ins. Co. of New York*, 533 N.Y.S.2d 215 (1988). In *Forbau*, the Texas Supreme Court acknowledged that in exercising concurrent jurisdiction, state courts must apply the substantive federal law of ERISA. However, the court went on to say that it and other state courts "remain free to apply their own rules of procedure," including the right to a jury trial. 876 S.W.2d 132, 145 n. 19.

To date, this Court has not ruled directly on the question of right to jury trial under 29 U.S.C. § 1132(a)(1)(B). As the South Carolina Court of Appeals' decision is at odds with the principles established by this Court as well as with the rulings of every federal court of appeals which has considered the question, consideration of the matter by this Court is essential.

IV.

This case illustrates that an important unresolved question of federal law exists regarding the mode of trial in an ERISA claim for benefits post-*Firestone*, and this Court should settle the question.

In determining that the Respondents were entitled to a jury trial in their ERISA claim for benefits lawsuit, the South Carolina Court of Appeals erroneously relied upon this Court's decision in *Firestone Tire & Rubber Company v. Bruch*, 489 U.S. 101 (1989). The state court reasoned that *Firestone* had impliedly overruled federal courts of appeals which denied ERISA claimants a jury trial based upon the incompatibility of ERISA's "arbitrary and capricious" stan-

dard of review with trial by jury when the *Firestone* Court held that some ERISA cases warranted a de novo standard of review. (App. 1-6.) That court interpreted *Firestone* as indicating a departure from the view that actions to recover statutory ERISA benefits were equitable in nature. (App. 1-8.) As a result, the state court held that an ERISA claim for benefits under 29 U.S.C. 1132(a)(1)(B) is triable to a jury even when the applicable standard of review is abuse of discretion, as in the instant case. (App. 1-8 to 1-9.)

However, the South Carolina Court of Appeals failed to note that this Court's decision in *Firestone* merely eliminated one of the analytical underpinnings of courts' refusal to allow ERISA claims for benefits to be tried by jury by eliminating the arbitrary and capricious standard of review in some cases. *Firestone* did not address or change the essentially equitable nature of ERISA's statutory remedies.

The South Carolina Court of Appeals is not alone in misapprehending the effect of the Court's *Firestone* decision on an ERISA claims for benefits and, as a result, holding that jury trials are available for claims under § 1132(a)(1)(B). *See e.g. Hulcher v. United Behavioral Syst., Inc.*, 919 F. Supp. 879 (E.D. Va. 1995); *Vaughn v. Owen Steel Co.*, 871 F. Supp. 247 (D.S.C. 1994); *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, n.19 (Tex. 1994) (dissent); *Head v. Central Reserve Life of N. America Ins. Co.*, 845 P.2d 735, 740 (Mont. 1993); *Steeples v. Time Ins. Co.*, 139 F.R.D. 688 (N.D. Okla. 1991); *Overcash v. Blue Cross & Blue Shield*, 381 S.E.2d 330 (N.C. Ct. App. 1989); *Fuller v. INA Life Ins. Co. of New York*, 533 N.Y.S.2d 215 (1988); *Walker v. Sperry & Hutchinson Co.*, 544 N.Y.S.2d 958 (1989); *c.f. Oil, Chem. and Atomic Workers' Internat'l v. Amoco Corp.*, No. 93 C5929, 1996 WL 562447 (N.D. Ill. Sept. 27, 1996); *Vicinanzo v. Brunschwig & Fils, Inc.*, 739 F.Supp. 882 (D.N.Y. 1990).

Reliance on *Firestone* to afford a jury trial in ERISA cases is misplaced as *Firestone* did not address the right to a jury trial. Instead, the opinion merely addressed the stan-

dard of review in an ERISA claim for benefits case in which the ERISA plan did not grant the plan administrator discretion to interpret the terms of the plan. Indeed, this Court actually stated that the courts (rather than juries) should conduct even the de novo review:

> But other settled principles of *trust law*, which point to de novo review of benefit eligibility determinations based on plan interpretations, belie this contention. As they do with contractual provisions, courts construe terms in trust agreements without deferring to either party's interpretation. "The extent of the duties and powers of a trustee is determined by the rules of law that are applicable to the situation, and not the rules that the trustee or his attorney believes to be applicable, and by the terms of the trust as the court may interpret them, and not as they may be interpreted by the trustee himself or by his attorney." 3 W. Fratcher, Scott on Trusts § 201, at 221 ([italics] emphasis added).

489 U.S. 112 (underlining added; italics by Court). All three of the cases relied upon by the *Firestone* Court for this statement involved non-jury trials. *See* 489 U.S. at 113 *citing with approval Connor v. Phoenix Steel Corp.*, 249 A.2d 866 (Del. 1969); *Atlantic Steel Co. v. Kitchens*, 187 S.E.2d 824 (Ga. 1972); *Sigman v. Rudolph Wurlitzer Co.*, 11 N.E.2d 878 (Ohio 1937).

Moreover, even assuming, *arguendo*, that the *Firestone* Court's addition of the de novo standard of review entails jury trials, the South Carolina Court of Appeals misapprehended that standard of review's application to the instant case. 489 U.S. 101. Here, the Plan's Answer expressly asserted as a fourth defense that the Plan Committee had discretion to interpret the provisions of the Plan, that the Plan Committee's decision was neither arbitrary nor capricious, and that the abuse of discretion standard of review applied. (App. 17-5.) No party has disputed the abuse of discretion standard of review's applicability to this case. The *Firestone* Court expressly endorsed the

continued applicability of the abuse of discretion standard of review to benefit claims denials in a plan giving the administrator discretion.[1] *Id.* at 113. As recently as March 19, 1996, this Court reaffirmed the *Firestone* distinction by writing, "[a]fter all, *Firestone*, which authorized deferential court review when the plan itself gives the administrator discretionary authority, based its decision upon the same common-law trust doctrines . . . ." *Varity*, 116 S.Ct. 1065, 1079. Therefore, *Firestone* is inapplicable to this case.

This case presents an opportunity for the Court to resolve a lingering dispute among the federal courts of appeals and state appellate courts as well as some federal district courts over the impact *Firestone* has on mode of trial in an ERISA claim for benefits-due lawsuit.

V.

Allowing the South Carolina Court of Appeals and other state courts to apply their own laws while exercising their concurrent jurisdiction power under ERISA defeats one of ERISA's primary objectives — uniformity — and, thus, presents an important question of federal law to be decided by this Court.

The South Carolina Court of Appeals overstepped its power under ERISA's grant of concurrent jurisdiction. In 29 U.S.C. § 1132(e)(1), Congress conferred jurisdiction upon both state and federal courts for claims brought under 29 U.S.C. § 1132(a)(1)(B). However, in exercising its concurrent jurisdiction power to resolve a federal question

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[1] Some federal courts of appeal have debated whether the abuse of discretion and arbitrary and capricious standards of review are different. For example, in *Lockhart v. UMWA*, 5 F.3d 74, 77 n. 5 (4th Cir. 1993), the court found it unnecessary to decide whether the arbitrary and capricious standard was viable since the result would be the same under either that standard or an abuse of discretion standard.

arising under ERISA, the South Carolina Court of Appeals was not entitled to apply state procedural rules to afford the Respondents a jury trial. Pursuant to ERISA's preemption provision, all state law which "relates to" an ERISA plan is preempted. 29 U.S.C. § 1144; *see also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990). This is true for state procedural law as well as for state substantive law when a part of the rights afforded by the federal statute is too substantial to permit it to be classified as a mere "local rule of procedure." *See Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 363 (1952) (holding that in exercising its concurrent jurisdiction, a state court must recognize that the right to a jury trial is a basic and fundamental feature of the system of federal jurisprudence and that it is "part and parcel" of the remedy afforded by a federal statute governing employer's liability to railroad workers). Under ERISA, the mode of trial is so intertwined with the relief available therein, the scope of review, and the assets protection section that it is implicitly a substantive part of the statute.

Moreover, the South Carolina Court of Appeals should not have applied a state law right to jury trial in light of the purpose behind ERISA. This Court has articulated the following test to be used by state courts exercising concurrent jurisdiction when deciding whether to apply state procedural law to a claims arising under a federal statute: (1) whether the issue requires a nationally uniform body of law; (2) whether application of state law would frustrate the federal program's objectives; and, (3) whether application of a federal rule would disrupt commercial relationships predicated on state law. *United States v. Kimball Foods*, 440 U.S. 715 (1979); *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454 (9th Cir. 1986). The legislative history of ERISA clearly establishes that uniformity was one of Congress' primary goals in enacting the Act. "In enacting ERISA, Congress, relying on the Commerce and Supremacy Clauses, sought and established uniformity and consistency in employee benefit policies." *ERISA, Preemp-*

tion and Comprehensive Federal Health Care, 16 Campbell L. Rev. 405 (Summer 1994); 120 Cong. Rec. S29942 (1974) (remarks of Sen. Javits, the principal sponsor of ERISA). Allowing jury trials on ERISA benefit claims would also be counter to Congress' goal of keeping related administrative costs down to encourage employers' voluntary implementation of employee benefit plans. Certainly, allowing the fifty states to apply their various laws to determine whether a claimant seeking ERISA trust plan benefits is entitled to a jury trial — in the face of the federal courts of appeals' denial of jury trials in ERISA statutory trust benefit claims — would not encourage uniformity.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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February 5, 1997

APPENDIX 1

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Payden Shaw and Juanita Shaw,.....Respondents,

v.

Atlantic Coast Life Insurance Company and
Atlantic Coast Life Insurance Company
Employee Benefit Plan,.....Appellants.

Appeal From Georgetown County
Charles W. Whetstone, Jr., Circuit Court Judge

Opinion No. 2488
Heard January 9, 1996 - Filed March 18, 1996

AFFIRMED

D. Cravens Ravenel, of Baker, Barwick, Ravenel & Bender, of Columbia; and Peyre T. Lumpkin, of Hinds, Cowan, Strange, Greer & Lumpkin, of Georgetown, for appellants.

Lisa Poe Davis, of Kelaher, Connell & Connor, of Surfside Beach, for respondents.

HEARN, J.: Atlantic Coast Life Insurance Company (Atlantic Coast) and Atlantic Coast Life Insurance Company Employee Benefit Plan (the Plan) appeal the trial judge's Order denying their motions to transfer this case to the non-jury roster. We affirm.

Payden Shaw and his wife, Juanita Shaw, filed a complaint seeking damages from Atlantic Coast for breach of contract for failure to pay benefits for Juanita Shaw's medical expenses, incurred after receiving pre-operative approval under the Atlantic Coast Life Employee Group Health Insurance. Payden Shaw's employer, Atlantic Coast, provided a group insurance plan for its employees and their family members. This Plan is an employer-sponsored, self-funded health insurance policy which is part of a qualified plan under the terms of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C.A §1001, *et seq.*

Thereafter, the Shaws filed an amended complaint which named the Plan as an additional defendant. Both defendants moved to transfer the case to the non-jury roster on the ground, *inter alia*, that an action to recover ERISA benefits is equitable and there is no right to a jury trial. The trial judge denied the defendants' motions. Both defendants appeal.

I.

Appellants assert the trial judge erred in finding that the Shaws requested a jury trial in that no jury request was made in the Amended Complaint. We disagree.

The trial judge's Order denying Appellants' motions to transfer the case to the non-jury docket stated in part, "[a]fter Plaintiffs requested a jury trial, Defendants moved to transfer the case to the non-jury docket." Appellants argue that although the original Complaint filed contained the word "jury," the Amended Complaint contained no such designation. Furthermore, Appellants argue that pursuant to Rule 38(d), SCRCP, the Shaws failed to serve a

demand for a jury trial, which constituted a waiver of a jury trial.

The method for demanding a jury trial is set forth in Rule 38(b), SCRCP, which states:

> Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

The failure to serve and file a timely demand is governed by Rule 38(d), SCRCP, which provides:

> The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties, except where an opposing party is in default under Rule 55(a).

Once a jury trial is properly demanded it may only be waived based on the provisions of Rule 39(a), SCRCP, which states:

> When a trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the calendar and the clerk's filebook as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or its own initiative finds that a right of trial by jury of some or all of those issues does not exist.

Pursuant to Rules 38(d) and 39(a), SCRCP, we find the Shaws properly demanded a jury trial and did not waive this right. Although the Amended Complaint did not designate the case as "jury," the initial Complaint properly made this designation on its face. The Amended Complaint only added the Plan as a defendant and did not add additional causes of action which would have affected the "jury" designation. Furthermore, neither the Shaws nor their attorney stipulated in writing that a jury trial was waived.

II.

Appellants assert the trial judge erred in denying their motions to transfer the case to the non-jury roster. The key issue in this appeal is whether the Shaws, seeking recovery of benefits pursuant to 29 U.S.C.A. §1132(a)(1)(B), are entitled to a jury trial. We hold the trial judge correctly ordered a jury trial.

Most federal courts have denied a jury trial for benefits-due lawsuits under ERISA. These courts have cast employee benefit plans as trusts, subject to equitable jurisdiction. See, *e.g., Wardle v. Central States, Southeast and Southwest Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980), *cert. denied*, 339 U.S. 1112 (1981); *accord In re Vorpahl*, 695 F.2d 318 (8th Cir. 1982); *Calamia v. Spivey*, 632 F.2d 1235 (5th Cir. 1980);. *Berry v. CIBA-Geigy Corp.*, 761 F.2d 1003 (4th Cir. 1985); *Blake v. Unionmutual Stock Life Ins. of America*, 906 F.2d 1525 (11th Cir. 1990); *Bair v. General Motors Corp.*, 895 F.2d 1094 (6th Cir. 1990); *Cox v. Keystone Carbon Co.*, 894 F.2d 647 (3d Cir. 1990) *cert denied*, 498 U.S. 811; *Kirk v. Provident Life and Accident Ins. Co.*, 942 F.2d 504 (8th Cir. 1991); *Connors v. Ryan's Coal Co.*, 923 F.2d 1461 (11th Cir. 1991); *Biggers v. Wittek Indus. Inc.*, 4 F.3d 291 (4th Cir. 1993); *Spinelli v. Gaughan*, 12 F.3d 853 (9th Cir. 1993).[2]

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[2] This approach has been criticized by commentators. *See, e.g.*, George Lee Flint, Jr., *ERISA: Jury Trial Mandated for Benefit Claims Actions*, 25 Loy. L.A. L. Rev., 361 (1992).

Since ERISA grants concurrent jurisdiction to the states in benefits-due actions, the jury trial issue also has been considered by state courts. ERISA is silent on the right to a jury trial; therefore, state courts considering the issue have focused on their own constitutions and statutes. They have also considered whether the employee benefit plan should be viewed as a contract, legal in nature, or as a trust, equitable in nature. George Lee Flint, Jr., *ERISA: Jury Trial Mandated for Benefit Claims Actions*, 25 LOY. L.A. L. Rev., 361, 376 (1992). This case marks the first time a South Carolina court has been asked to rule on this issue.

The majority of state courts, prior to and subsequent to the enactment of ERISA, have viewed the plans as contractual, thus granting jury trials in benefits-due lawsuits. *See, e.g., Wayte v. Rollins Int'l Inc.*, 215 Cal. Rptr. 59, 63 (Cal. Ct. App. 1985) (pre-ERISA plan contractual so jury trial; employee sued plan for medical benefit); *Bird v. Connecticut Power Co.*, 133 A.2d 894 (Conn. 1957) (former employee sued for pension payment from pension plan); *Cotton v. Edward Don & Co.*, 245 So. 2d 881, 882 (Fla. Dist. Ct. App 1971) (former employee sued employer for vested share in profit-sharing plan); *General Elec. Co. v. Martin*, 574 S.W.2d 313, 315 (Ky. Ct. app. 1978) (former employee sued employer for disability benefit from pension plan); *Montgomery Ward & Co. v. Williams*, 47 N.W.2d 607, 608 (Mich. 1951) (employer sued employee to recover amount wrongfully paid under health and accident insurance plan); *Rakness v. Swift & Co.*, 175 N.W.2d 429, 432 (Minn. 1970) (employee sued employer for denied disability benefit from retirement plan); *Blacik v. Canco Division-American Can Co.*, 156 N.W.2d 239, 242 (Minn. 1968) (former employee sued employer for additional retirement benefit and vacation pay); *Stopford v. Boonton Molding Co.*, 265 A.2d 657, 659 (N.J. 1970) (retiree sued employer for anticipatory breach of vested contractual right to pension from pension plan); *Hindle v. Morrison Steel Co.*, 223 A.2d 193, 194 (N.J. Super Ct. App. Div. 1966) (former employee sued employer to recover contractual rights in retirement fund); *Gearns v. Commercial Cable Co.*, 42 N.Y.S.2d 81, 82 (App. Div. 1943) (employee sued em-

ployer for monthly payment due under retirement plan), *aff'd*, 293 N.Y. 105 (1944); *Going v. Southern Mill Employees' Trust*, 281 P.2d 762 (Okla. 1955) (employee sued trust to compel payment of share in profit-sharing plan); *Amicone v. Kennecott Cooper Corp.*, 431 P.2d 130 (Utah 1967) (employee sued employer for disability benefits from pension plan).

A minority of state courts have viewed the matter under trust law and therefore denied jury trials. *See e.g., Kennet v. United Mineworkers*, 183 F. Supp. 315, 316 (D.D.C. 1960) (tried without jury; retiree suing for benefit termination from multi-employer plan); *Ruth v. Lewis*, 155 F. Supp. 346, 348 (D.D.C. 1958) (judge weighed evidence for former employee suing for pension benefit from multi-employer plan); *Hobbs v. Lewis*, 159 F. Supp. 282, 284 (D.D.C. 1958) (same); *Ex parte Garner*, 190 So. 2d 544, 546 (Ala. 1966) (former employee sued trustee for benefit from profit-sharing plan; case transferred from law to equity; presumed non-jury trial as before Alabama required jury trial in-equity); *Barlow v. Roche*, 161 A.2d 58, 63 (D.C. 1960) (tried in equity even though brought as action at law for monies due and owing under multi-employer health plan); *Forrish v. Kennedy*, 105 A.2d 67, 68 (Pa. 1954) (employee sued trustees for retirement pension from multi-employer plan in equity). *But see Dixon v. Northwestern Nat'l Bank of Minneapolis*, 297 F. Supp. 485, 489 (D. Minn. 1969) (former employees' suit for vested benefit upon profit-sharing plan termination has right to jury trial under trust law's legal remedy).

Appellants argue this Court is bound by the Fourth Circuit decisions which have held that ERISA actions are equitable and do not afford a jury trial. *Berry v. CIBA-Geigy Corp.*, 761 F.2d 1003 (4th Cir. 1985); *Biggers v. Wittek Indus. Inc.*, 4 F.3d 291 (4th Cir. 1993). Respondents dispute these cases as being dispositive and argue that the United States Supreme Court impliedly overruled *Berry*, on which the *Biggers* court relied, in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 191, 109 S.Ct. 948, 103 L.Ed.2d 80 (1980). We agree.

In *Berry*, an employee disability benefits plan beneficiary brought suit in state court challenging the plan trustee's decision to terminate the beneficiary's long-term disability benefits. The case was removed to the federal district court. In its charge, the district court instructed the jury to apply an "arbitrary and capricious" standard in deciding the issue in the case. The Fourth Circuit reversed the jury trial and held that the district court erred in submitting an arbitrary and capricious standard to the jury. *Berry*, 761 F.2d at 1004; *See LeFebre v. Westinghouse Elec. Corp.*, 747 F.2d 197 (4th Cir. 1984). The Court reasoned that this was a matter for the court and was "incompatible with a jury trial scheme." *Berry*, 761 F.2d at 1007. Consistent with the majority of federal decisions, the court also found that the determination of rights under an employee benefit plan was equitable in character. One of the primary reasons stated in support of this proposition is that jury trials are incompatible with the arbitrary and capricious standard of review. *Id.*

Thereafter, in 1989, the United States Supreme Court decided *Firestone Tire and Rubber Co. v. Bruch*. In *Firestone*, the Supreme Court determined the appropriate standard of review in §1132(a)(1)(B) actions challenging denials of benefits based on plan interpretations. The Supreme Court ruled that federal courts that had applied the arbitrary and capricious standard of trust law to ERISA actions were applying an incorrect standard. The Court stated that "[a]ctions challenging an employer's denial of benefits before the enactment of ERISA were governed by principles of contract law." *Firestone*, 109 S.Ct. at 995. The Court concluded that by using an arbitrary and capricious standard, the federal courts were "afford[ing] less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Id.* at 956. Since one of the primary reasons for holding that ERISA actions were not triable before a jury was the perceived incompatibility between jury trials and the arbitrary and capricious standard of review, *Firestone* was held by some courts as a departure

from the view that actions to recover ERISA benefits were equitable in nature and hence not subject to the right to jury trials. *See Vaughn v. Owen Steel Co., Inc.*, 871 F. Supp. 247 (D.S.C. 1994); *Overcash v. Blue Cross and Blue Shield*, 381 S.E.2d 330 (N.C. Ct. App. 1989).[3]

Nevertheless, a denial of the right to a jury trial in ERISA cases appears to have survived *Firestone* in the Fourth Circuit. In *Biggers v. Wittek Indus., Inc.*, 4 F.3d 291 (4th Cir. 1993), a post-*Firestone* decision, a terminated employee sought severance benefits under an employee welfare benefit plan covered by ERISA. The Fourth Circuit reversed a jury trial decided under state contract law. The Court held that ERISA preempted the employee's common law contract claim and should have been tried by the court under the principles of ERISA, rather than before a jury.

At least one Federal District Court decision in this Circuit, however, has read *Firestone* as altering the *Berry* view that ERISA actions do not afford a jury trial. In *Vaughn v. Owen Steel Co., Inc.*, 871 F. Supp. 247 (D.S.C. 1994), Judge Anderson stated the Supreme Court "impliedly overruled both [*Berry* and *LeFebre*]," stating:

> The Supreme Court has thus recast some ERISA claims as legal, without expressly so holding. Despite trust law language in ERISA and the Supreme

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[3] The *Firestone* Court noted in dicta that the arbitrary and capricious standard of review, a standard normally viewed as militating against a jury trial, still applied where the trustee's decision was discretionary. In this case it appears from the pleadings that, based upon the trustee's discretionary authority, the jury may be required to decide whether the denial of benefits was arbitrary and capricious. Appellants raise this argument in their brief; however, it was not advanced before the trial court. Accordingly, we cannot consider it. *Smith v. Phillips*, ___ S.C. ___, 458 S.E.2d 427 (1995); *Talley v. South Carolina Higher Educ. Tuition Grants Comm.*, 289 S.C. 483, 347 S.E.2d 99 (1986).

> Court cases, traditional trust law does not afford de novo review, compensatory damages, or punitive damages. The Supreme Court is following its analogy of contract law actions through to afford legal remedies. The logical conclusion is that, despite being couched within a statutory scheme which mirrors trust law, some ERISA claims and remedies are legal ones and thus should be afforded a trial jury.

Accordingly, the Federal District Court held that since prior to ERISA, breach of contract actions were legal actions requiring a jury, the implied right to a jury trial survived the passage of ERISA. 871 F. Supp. at 250. "The more requirement that such a claim be brought pursuant to ERISA does not transform the action or remedy into an equitable one or affect the Seventh Amendment right to a jury trial of legal issues. *Id.* at 251.

We find persuasive the reasoning employed in *Vaughn* and in the majority of state court decisions. Despite its ERISA label, this lawsuit is essentially an action for breach of contract, seeking money damages. Therefore, it is an action at law triable before a jury under South Carolina law. S.C. CONST. art. 1, § 14; *Collier v. Green*, 244 S.C. 367, 137 S.E.2d 277 (1964).

Accordingly, the decision of the trial judge is

AFFIRMED.

SHAW, and GOOLSBY, JJ., concur.

APPENDIX 2

STATE OF SOUTH CAROLINA	) IN THE COURT
	) OF COMMON
COUNTY OF GEORGETOWN	) PLEAS JUDICIAL
	) CIRCUIT
	) CASE NO.:
	) 93-CP-22-154
Payden Shaw and Juanita Shaw.	)
Plaintiffs,	)
	) **ORDER DENYING**
vs.	) **DEFENDANT'S**
	) **MOTION**
Atlantic Coast Life	) **TO TRANSFER**
Insurance Co. and	) **TO NON-JURY**
Atlanta Coast Life	) **ROSTER**
Insurance Co. Employee	)
Benefit Plan,	)
Defendants.	)
	)

This is a motion to transfer this case to the non-jury roster. Plaintiffs, husband and wife, initiated this action against Defendants, employer and benefit plan, asking for the sum of Fifty Thousand Dollars ($50,000.00) for medical expenses which the wife incurred while the husband was an employee of Atlantic Coast Life Insurance Company. Plaintiffs allege breach of contract because Defendants denied the payment of medical benefits after giving pre-operative approval. Defendants allege a pre-existing condition. After Plaintiff's requested a jury trial, Defendants moved to transfer this case to the non-jury docket.

Beneath this seemingly equitable issue of employee medical benefits and rights, there lurks a simple question: *Whether Defendants properly denied Plaintiffs' medical benefits due to a pre-existing condition, after Defendant gave pre-operative clearance. Sullivan v. LTV Aerospace & Defense Co.*, 850 F. Supp. 202, 209 (W.D.N.Y. 1994); *McDonald v. Art Craft Electric Supply Co.*, 774 F.Supp. 29 (D.D.C. 1991).

IT IS ORDERED that the Defendants' motion to transfer to the non-jury roster is denied.

AND IT IS ORDERED.

Charles W. Whetstone, Jr.
Administrative Judge for
the Fifteenth Judicial Circuit

Conway, South Carolina
January 19, 1995

APPENDIX 3

STATE OF SOUTH CAROLINA	)	IN THE COURT
	)	OF COMMON
COUNTY OF GEORGETOWN	)	PLEAS JUDICIAL
	)	CIRCUIT
	)	CASE NO.:
	)	93-CP-22-154
Payden Shaw and Juanita Shaw.	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**ORDER**
	)	
Atlantic Coast Life Insurance Company,	)	
Defendants.	)	
	)	

This matter came before the Court based on Defendant, Atlantic Coast Life Insurance Company's Motion for Summary Judgment. Before this Motion was heard the Court ruled a third party should be added to this action. The Court has extensively reviewed the Motion for Summary Judgment and the Employee Benefit Plan which is the subject of this litigation. The Court believes that the Atlantic Coast Life Insurance Company Employee Benefit Plan should be named as an additional Defendant. Accordingly,

IT IS ORDERED, that the Plaintiff shall serve a Summons and Complaint within thirty (30) days upon the At-

lantic Coast Life Insurance Company Employee Benefit Plan and name them as an additional Defendant. The Motion for Summary Judgment filed by the Defendant as to the pre-existing condition of the Plaintiff is reserved for a later date.

AND IT IS SO ORDERED.

s/ David H. Maring
David H. Maring
Presiding Judge of the Fifteenth
Judicial Circuit

August 30, 1994
Georgetown, SC

APPENDIX 4

SEAL

The South Carolina Court of Appeals

May 23, 1996

D. Cravens Ravenel, Esquire
Messrs. Baker, Barwick, Ravenel & Bender
P.O. Box 8057
Columbia, South Carolina 29202

Re: Payden Shaw, et al. v. Atlantic Coast Life Insurance Company, et al.

Dear Mr. Ravenel:

Your Petition for Rehearing has been denied in the following Order:

"Petition denied.

s/Kaye G. Hearn _____, J.
FOR THE COURT

Columbia, South Carolina
May 23, 1996."

The Remittitur will be held for a period of thirty days until the time to Petition for Writ of Certiorari has expired, after which it will be forwarded to the trial court.

Please notify this office within ten (10) days from the date of this letter, whether or not you want the records

in this case. If we have not heard from you by that date, the records will be destroyed.

Sincerely,

Kenneth A. Richstad
Clerk

KAR/sj
cc: The Honorable Clyde N. Davis, Jr.
Peyre T. Lumpkin, Esquire
Lisa Poe Davis, Esquire

APPENDIX 5

SEAL

The South Carolina Court of Appeals

May 23, 1996

Elizabeth Carpentier, Esquire
Messrs. Sinkler & Boyd
P.O. Box 11889
Columbia, South Carolina 29211

Re: Payden Shaw, et al. v. Atlantic Coast Life Insurance Company, et al.

Dear Ms. Carpentier:

Your Motion for Permission to File Amicus Brief in Support of Petition for Rehearing by Appellants has been denied in the following Order:

"Motion denied.

s/Kaye G. Hearn, J.
FOR THE COURT

Columbia, South Carolina
May 23, 1996."

Sincerely,

Kenneth A. Richstad
Clerk

KAR/sj
cc: D. Cravens Ravenel, Esquire
Peyre T. Lumpkin, Esquire
Lisa Poe Davis, Esquire

APPENDIX 6

SEAL

The South Carolina Court of Appeals

November 8, 1996

D. Cravens Ravenel, Esquire
Nekki Shutt, Esquire
Baker Barwick Ravenel & Bender
P O Box 8057
Columbia, SC 29202

Peyre T. Lumpkin, Esquire
Hinds Cowan Strange
Gregg & Lumpkin
P O Drawer 1410
Georgetown, SC 29442

Re: Shaw v. Atlantic Coast Life, etc.

Dear Counsel:

The Court has issued the following Order on your Petition for a Writ of Certiorari in the above entitled matter:

"Petition for Writ of Certiorari denied.

s/Ernest A. Finney, Jr., C.J.
For the Court

November 8, 1996."

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,

CLERK

CND, Jr./dmh

cc: Lisa Davis Esquire
The Honorable Kenneth A. Richstad
The Honorable Betty Williams
West Publishing Company

APPENDIX 7

ARTICLE III

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

APPENDIX 8

ARTICLE VI

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of the State to the Contrary notwithstanding.

APPENDIX 9

ARTICLE VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

APPENDIX 10

§1132. Civil Enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought -

(1) by a participant or beneficiary.

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify the rights to future benefits under the terms of the plan.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

§1144. Other Laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 4(a), which is not exempt under section 4(b) (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 506 of this Act.

(4) Subsection (a) shall not apply to any generally applicable criminal law of a State

(5)(A) Except as provided in subparagraph (B), subsection (a) shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a).

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983, but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts 1 and 4 and the preceding sections of this part.

(6)(A) Notwithstanding any other provision of this section -

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides -

(I) standards, requiring the maintenance of specified levels of reserves and specific levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any employee welfare benefit plan which is a multiple-employer welfare arrangement, in addition to this title, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this title.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangements or each arrangement which is a member of such class meets the requirements of section 3(1) and section 4 necessary to be considered an employee welfare benefit plan to which this title applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this title apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employee welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by

an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title, qualified medical child support orders (within the meaning of section 1169(a)(2)(A) of this title), and the provisions of law referred to in section 1169(a)(2)(B)(ii) of this title to the extent enforced by qualified medical child support orders.

(8) Subsection (a) of this section shall not be construed to preclude any State cause of action-

(A) with respect to which the State exercises its acquired rights under section 1169(b)(3) with respect to a group health plan (as defined in section 1167(1)), or

(B) for recoupment of payment with respect to items or services pursuant to a State plan for medical assistance approved under title XIX of the Social Security Act [42 U.S.C.A. § 1396 *et seq.*] which would not have been payable if such acquired rights had been executed before payment with respect to such items or services by the group health plan.

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of the United States prohibited.

Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(c)) or any rule or regulation issued under any such law.

APPENDIX 12

STATE OF SOUTH CAROLINA	) IN THE COURT
	) OF COMMON
COUNTY OF GEORGETOWN	) PLEAS JUDICIAL
	) CIRCUIT
	) CASE NO.:
	) 93-CP-22-154
Payden Shaw and Juanita Shaw,	)
	)
Plaintiffs,	)
	) **NOTICE OF**
vs.	) **MOTION TO**
	) **TRANSFER**
Atlantic Coast Life Insurance Company,	) **TO NON-JURY**
	) **ROSTER**
	)
Defendants.	)
	)

TO: THE PLAINTIFFS, PAYDEN SHAW AND JUANITA SHAW AND GENE M. CONNELL, JR., THEIR ATTORNEY

YOU WILL PLEASE TAKE NOTICE that the undersigned, on behalf of the Defendant, will, not less than ten (10) days after service of this Notice of Motion and Motion upon you, exclusive of the day of service, move before the Presiding Judge for an order transferring the above case to the non-jury roster on the grounds that Federal Law governs this action, and that an action to recover ERISA benefits is equitable and there is no right to a jury

trial. A further grounds for this motion is that the Plaintiffs have not timely demanded a jury trial as required by Rules 38 and 39, SCRCP.

I certify pursuant to Rule 11, SCRCP, that, I have attempted to consult with the attorney for the Plaintiffs regarding this motion but that because of time constraints we could not reach an agreement and a hearing is necessary.

HINDS, COWAN, STRANGE, GEER & LUMPKIN
Attorneys for the Defendant
Atlantic Coast Life Insurance Company
604 Front Street
P.O. Drawer 1410
Georgetown, SC 29442

BY: s/ Peyre Lumkin
Peyre T. Lumpkin

Georgetown, South Carolina
July 20, 1994

APPENDIX 13

STATE OF SOUTH CAROLINA	) IN THE COURT
	) OF COMMON
COUNTY OF GEORGETOWN	) PLEAS JUDICIAL
	) CIRCUIT
	) CASE NO.:
	) 93-CP-22-154
	) **DEFENDANT**
Payden Shaw and Juanita Shaw,	) **ATLANTIC**
	) **COAST LIFE**
Plaintiffs,	) **INSURANCE**
	) **COMPANY**
vs.	) **EMPLOYEE**
	) **BENEFIT**
Atlantic Coast Life	) **PLAN'S**
Insurance Company,	) **MOTION TO**
	) **TRANSFER**
Defendants.	) **TO NON-JURY**
_____	)

TO: GENE M. CONNELL, JR., ESQUIRE, ATTORNEY FOR THE PLAINTIFFS,

Defendant Atlantic Coast Life Insurance Company Employee Benefit Plan, by and through its undersigned counsel, hereby moves for an order transferring this action to the non-jury calendar on the grounds that the plaintiff is not entitled to a jury trial for the Employee Retirement Income Security Act (ERISA) claim set forth in the complaint.

s/ D. Cravens Ravenel

D. Cravens Ravenel
BAKER, BARWICK, RAVENEL & BENDER, L.L.P.
1730 Main St., Post Office Box 8057
Columbia, South Carolina 29202
(803) 799-9091
Our File No.: 8560

Attorneys for Defendant Atlantic
Coast Insurance Company Employee
Benefit Plan
Columbia, South Carolina
January 6, 1995.

APPENDIX 14

STATE OF SOUTH CAROLINA	) IN THE COURT
	) OF COMMON
COUNTY OF GEORGETOWN	) PLEAS JUDICIAL
	) CIRCUIT
	) CASE NO.:
	) 93-CP-22-154
Payden Shaw and Juanita Shaw,	)
	)
Plaintiffs,	)
	)
vs.	) **SUMMONS**
	)
Atlantic Coast Life Insurance Company,	)
	)
Defendants.	)
	)

TO THE DEFENDANT NAMED ABOVE:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint on the Plaintiff's attorney at 631 Front Street, Post Office Box 1486, Georgetown, South Carolina 29442, within thirty (30) days of such service, exclusive of the day of service, and should you fail to answer the Complaint within the time aforesaid, the Plaintiffs herein will apply to the Court for relief sought in the Complaint.

Adams, Quackenbush, Herring &
Stuart, P.A.

Attorneys for the Plaintiffs

Louis J. Kelaher
Eugene S. N. Lawrimore
631 Front Street
Post Office Box 1486
Georgetown, South Carolina 29442
(803) 546-5132

Georgetown, South Carolina
March 25, 1993.

STATE OF SOUTH CAROLINA	) IN THE COURT
	) OF COMMON
COUNTY OF GEORGETOWN	) PLEAS JUDICIAL
	) CIRCUIT
	) CASE NO.:
	) 93-CP-22-154
Payden Shaw and Juanita Shaw,	)
	)
Plaintiffs,	)
	)
vs.	) **COMPLAINT**
	)
Atlantic Coast Life Insurance Company,	) Jury
	) Insurance
	) Claim
Defendants.	)
	)

For Recovery of Benefits Under ERISA
and Attorneys Fees and Costs

THE PLAINTIFFS, complaining of the Defendant herein, would show to this Honorable Court as follows:

1. That the Plaintiffs are residents of Berkeley County, South Carolina and the Defendant is a corporation licensed to do business in South Carolina and is doing business in Georgetown County, South Carolina, and that at all times mentioned herein Plaintiff Payden Shaw was an employee of the Defendant working in Georgetown County, South Carolina.

2. That as a part of the benefits of employment, the Plaintiffs were covered by a group insurance plan designated "Atlantic Coast Life Employee Group Health Insurance", bearing policy number 91235014. The aforesaid insurance policy provided for dependant coverage, and therefore provided for coverage of Juanita Shaw, the wife of Plaintiff Payden Shaw.

3. That during the month of March 1991, while fully insured under the above described insurance plan, Juanita Shaw required medical attention including hospitalization and treatment by physicians, at the Georgetown County Memorial Hospital and at the offices of various doctors in Georgetown, South Carolina.

4. That prior to undergoing surgery the Plaintiffs obtained pre-operative clearance from the Defendant that the medical expenses incurred as a result of the surgery would be covered by the above described policy.

5. That following the surgery, the Plaintiffs made a claim for benefits owed under the policy.

6. The Defendant failed and refused to honor the contract with its insureds, Payden W. Shaw and Juanita Shaw, and failed and refused to pay any and all hospitalization and medical bills incurred as a result of the treatment of Juanita Shaw.

7. That as a direct and proximate result of the breach of this contract with the Plaintiffs by the Defendant, the Plaintiffs have sustained damages in excess of Fifty Thousand and no/100 ($50,000.00) Dollars.

8. The Plaintiffs are informed and believe that they are entitled to recover benefits rightfully due them under the terms of their insurance plan pursuant to 29 U.S.C. Section 1132(a).

9. The Plaintiffs are further informed and believe that they are entitled to the recovery of reasonable attorney's fees and costs incurred as a result of this action pursuant to 29 U.S.C. Section 1132(g)(1).

WHEREFORE, the Plaintiffs pray judgment against the Defendant for the amount of insurance proceeds due them as a result of medical expenses incurred and for which the Defendant denies reimbursement pursuant to 29 U.S.C. Section 1132(a), for attorneys fees and costs pursuant to 29 U.S.C. Section 1132(g)(1) and for such other and further relief as the court may deem just and proper.

Adams, Quackenbush, Herring &
Stuart, P.A.
Attorneys for the Plaintiffs

_____

Louis J. Kelaher
Eugene S. N. Lawrimore

631 Front Street
Post Office Box 1486
Georgetown, South Carolina 29442
(803) 546-5132

Georgetown, South Carolina
March 25, 1993

APPENDIX 15

STATE OF SOUTH CAROLINA	) IN THE COURT
	) OF COMMON
COUNTY OF GEORGETOWN	) PLEAS JUDICIAL
	) CIRCUIT
	) CASE NO.:
	) 93-CP-22-154
Payden Shaw and Juanita Shaw,	)
	)
Plaintiffs,	)
	)
vs.	) **AMENDED**
	) **SUMMONS**
Atlantic Coast Life Insurance Company,	)
	)
Defendants.	)
	)

TO: Peyre T. Lumpkin, Attorney for Defendants

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscriber or subscribers at his or their office at Suite 209, The Courtyard, 1500 U.S. Highway 17 North, Surfside Beach, South Carolina 29587 within thirty (30) days after the service hereof; exclusive of the day of service; and if you fail to answer the

Complaint within the time aforesaid; the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you for the relief demanded in the Complaint.

KELAHER & CONNELL, P.A.

Gene M. Connell, Jr.
Post Office Box 14547
Surfside Beach, S.C. 29587
(803) 238-5648
Attorney for Plaintiffs

August 24, 1994

STATE OF SOUTH CAROLINA	) IN THE COURT
	) OF COMMON
COUNTY OF GEORGETOWN	) PLEAS JUDICIAL
	) CIRCUIT
	) CASE NO.:
	) 93-CP-22-154
Payden Shaw and Juanita Shaw,	)
	)
Plaintiffs,	)
	)
vs.	) **AMENDED**
	) **COMPLAINT**
Atlantic Coast Life Insurance Company,	)
	)
Defendants.	)

For Recovery of Benefits Under ERISA
and Attorneys Fees and Costs

The Plaintiffs, complaining of the Defendants herein, would show to this Honorable Court as follows:

1. That the Plaintiffs are residents of Berkeley County, South Carolina and the Defendant, Atlantic Coast Life Insurance Company, is a corporation licensed to do business in South Carolina and is doing business in Georgetown County, South Carolina, and that at all times mentioned herein Plaintiff Payden Shaw was an employee of the Defendant working in Georgetown County, South Carolina. That the other Defendant, Atlantic Coast Life

Insurance Company Employee Benefit Plan, is the plan under which the Plaintiff and his wife received group health insurance benefits and is made a Defendant pursuant to the Employee Benefit Plan document which provides health insurance benefits to the Plaintiff and his wife.

2. That as a part of the benefits of employment, the Plaintiffs were covered by a group insurance plan designated "Atlantic Coast Life Employee Group Health Insurance", bearing policy number 91235014. The aforesaid insurance policy provided for dependant coverage, and therefore provided for coverage of Juanita Shaw, the wife of Plaintiff Payden Shaw.

3. That during the month of March 1991, while fully insured under the above described insurance plan, Juanita Shaw required medical attention including hospitalization and treatment by physicians, at the Georgetown County Memorial Hospital and at the offices of various doctors in Georgetown, South Carolina.

4. That prior to undergoing surgery the Plaintiffs obtained pre-operative clearance from the Defendants that the medical expenses incurred as a result of the surgery would be covered by the above described policy.

5. That following the surgery, the Plaintiffs made a claim for benefits owed under the policy.

6. That the Plaintiffs paid their premium on or about January 1, 1991, and continued to pay their premium until the Plaintiff, Payden Shaw, left his employment at Atlantic Coast Life Insurance Company.

7. That further, the employee benefit plan did not make any mention of collecting premiums one month prior to the effective date of the policy.

8. The Defendants failed and refused to honor the contract with its insureds, Payden W. Shaw and Juanita Shaw, and failed and refused to pay any and all hospitalization and medical bills incurred as a result of the treatment of Juanita Shaw.

9. That as a direct and proximate result of the breach of this contract with the Plaintiffs by the Defendants, the Plaintiffs have sustained damages in excess of Fifty Thousand and no/100 ($50,000.00) Dollars.

10. The Plaintiffs are informed and believe that they are entitled to recover benefits rightfully due them under the terms of their insurance plan pursuant to 29 U.S.C. Section 1132(a).

11. The Plaintiffs are further informed and believe that they are entitled to the recovery of reasonable attorney's fees and costs incurred as a result of this action pursuant to 29 U.S.C. Section 1132(g)(1).

WHEREFORE, the Plaintiffs pray judgment against the Defendant for the amount of insurance proceeds due them as a result of medical expenses incurred and for which the Defendant deny reimbursement pursuant to 29 U.S.C. Section 1132(a), for attorneys fees and costs pursuant to 29 U.S.C. Section 1132(g)(1) and for such other and further relief as the court may deem just and proper.

KELAHER & CONNELL, P.A.

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Attorney for Plaintiffs

August 26, 1994

APPENDIX 16

STATE OF SOUTH CAROLINA	) IN THE COURT
	) OF COMMON
COUNTY OF GEORGETOWN	) PLEAS JUDICIAL
	) CIRCUIT
	) CASE NO.:
	) 93-CP-22-154
Payden Shaw and Juanita Shaw,	)
	)
Plaintiffs,	)
	)
vs.	) **AMENDED**
	) **ANSWER AND**
Atlantic Coast Life	) **MOTION TO**
Insurance Company,	) **DISMISS**
	) **Rule 12(b)(6)**
Defendants.	) **SCRCP (NON-**
	) **JURY)**

The defendant, Atlantic Coast Life Insurance Company, (hereinafter "Atlantic") answers the Amended Complaint and alleges as follows:

FOR A FIRST DEFENSE

1. Atlantic admits only so much of paragraph one (1) of the Amended Complaint as alleges that it is doing business in Georgetown County, South Carolina, and that the plaintiff, Payden Shaw, *was* an employee of the defendant working in Georgetown County, South Carolina, and that the other defendant, Atlantic Coast Life Insurance Company Employee Benefit Plan (hereinafter, "*The*

Plan") provided health benefits, pursuant to, "the Plan document: beginning on February 1, 1991.

2. Atlantic admits only so much of paragraph two (2) of the Amended Complaint as alleges that health benefits are provided to employees of Atlantic, and their dependents, through a group health plan, and that the plaintiffs *were* eligible for this coverage, subject to the terms and conditions of that plan, including, but not limited to the limitation and exclusion for pre-existing conditions as set forth below.

3. Atlantic admits the allegations of Paragraph Five (5) and Seven (7) of the Amended Complaint.

4. Atlantic admits only so much of Paragraph Six (6) of the Amended Complaint as alleges that premiums were paid until termination of Mr. Shaw's employment.

5. Atlantic admits only so much of Paragraph Eight (8) of the Amended Complaint as alleges that the claims for medical care for Juanita Shaw described in the Amended Complaint were denied.

6. Atlantic denies the remaining allegations of the Amended Complaint and demands strict proof.

FOR A SECOND DEFENSE

Further answering the Amended Complaint, Atlan-

tic restates the First Defense above verbatim.

7. The Amended Complaint fails to state sufficient facts to constitute a cause of action against Atlantic and should be dismissed pursuant to Rule 12(b)(6), SCRCP.

FOR A THIRD DEFENSE

Further answering the Amended Complaint, Atlantic restates the First and Second Defenses above verbatim.

8. The health plan sponsored by Atlantic, under which the plaintiffs claim that benefits are due, is part of a qualified plan under the terms of the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC Section 1001, et seq. entitled, *The Atlantic Coast Life Insurance Company Employee Benefit Plan*, the terms and conditions of which are set forth in plan documents, (hereinafter, "*The Plan Documents*") the contents of which are expressly incorporated herein verbatim by reference.

9. *The Plan* is an employer-sponsored and self-insured plan, which is funded in part by Atlantic and in part by contributions from employees, and both benefits and premiums are based upon claims and costs from the prior year.

10. *The Plan*, though created by Atlantic, is a separate entity under the terms of 29 USC, Section 1132(d), and as expressly stated in *The Plan Documents*.

11. *The Plan*, has contractually delegated decisions regarding payment of claims to a Third-Party Administrator, Employee Benefit Services, Inc. (hereinafter, "EBS") of Charlotte, North Carolina, and it was this entity which revealed and denied the claims of the plaintiffs.

12. *The Plan Documents* provide a specific procedure for administrative review and appeal of claims, and the plaintiffs have failed to follow these Administrative Procedures, and their failure to follow and exhaust their Administrative Remedies is a bar to this action.

13. In the alternative, if the plaintiffs have followed the appeal procedures as outlined in *The Plan Documents*, the claims of the plaintiffs were denied only after a full and fair review as set forth in paragraph twenty-six (26) below.

FOR A FOURTH DEFENSE

Further answering the Amended Complaint, Atlantic restates the First, Second and Third Defenses above verbatim.

14. The plaintiff's health insurance coverage, including dependent coverage, began on February 1, 1991, and *The Plan Documents* contain a specific exclusion for all pre-existing conditions as follows:

A pre-existing condition is a condition, disease, ill-

ness or injury for which a participant or a dependent received any medical care or treatment, or incurred expenses prior to his effective date for major medical expense benefits under his plan . . . .

No benefits will be paid until that condition, disease, illness or injury is no longer considered a pre-existing condition.

A condition will no longer be considered pre-existing after:

(a) A period of six (6) consecutive months during which no medical care is received by the participant or his dependent for the pre-existing conditions; and/or

(b) A period of twelve (12) consecutive months during which the participant or his dependent is covered under the plan.

15. The plaintiff's spouse, Juanita Shaw, received medical care or treatment prior to February 1, 1991, for the same condition, disease, illness or injury for which she claims medical benefits in March of 1991.

16. Upon information and belief, the condition, disease, illness or injury for which she received treatment in March of 1991, was a pre-existing condition and is excepted from coverage.

FOR A FIFTH DEFENSE

Further answering the Amended Complaint, Atlantic restates the First, Second, Third and Fourth Defenses above verbatim.

17. Atlantic specifically denies that, "the plaintiffs obtained pre-operative clearance from this defendant that the medical expenses incurred as a result of the surgery would be covered by the above described policy", as alleged in paragraph four (4) of the Amended Complaint and demands strict proof.

18. On or about March 11, 1991, ValuTrac, a health management organization located in Charlotte, North Carolina, with whom EBS contracted, issued a written certification that the plaintiff, Juanita Shaw's, "medical care requires admission to the hospital".

19. This written certification also contained a bold and conspicuous disclaimer at the bottom which states, "This determination does not confirm patient eligibility or benefit coverage under your health plan".

FOR A SIXTH DEFENSE

Further answering the Amended Complaint, Atlantic restates the First, Second, Third, Fourth and Fifth Defenses above verbatim.

20. Atlantic specifically denies that, "the plaintiffs paid their premium on or about January 1, 1991," or that coverage began on January 1, 1991, as alleged in paragraph six (6) of the Amended Complaint and demands strict proof.

21. Atlantic, as Payden Shaw's employer offered to him the option to pay the entire first month's premium on February 1, 1991, or of paying his first month's premium, due on February 1, 1991, in four (4) weekly payments of Twenty-eight ($28.00) Dollars, which could be deducted from his weekly paycheck, beginning on January 1, 1991.

22. Payden Shaw requested weekly deductions beginning January 1, 1991, and as a result, on February 1, 1991, the plaintiff had put aside sufficient funds to pay the first month's premium on February 1, 1991, the date coverage began.

FOR A SEVENTH DEFENSE

Further answering the Amended Complaint, Atlantic restates the First, Second, Third, Fourth, Fifth and Sixth Defenses above verbatim.

23. This is the second action and third complaint brought by the plaintiffs to recover health benefits under *The Plan*.

24. Atlantic has and will incur expenses and attorney's fees to defend this action.

25. Atlantic has acted reasonably and in good faith at all times, and these claims for medical expenses were reviewed by EBS, and an independent agency, which concluded that these claims were excluded as "pre-existing"

by the terms of *The Plan*.

26. Atlantic is informed and believes that it is entitled to an award of reasonable attorney's fees against the plaintiffs, pursuant to 29 USC 1132(g)(1).

WHEREFORE, **Atlantic prays as follows:**

A. That the court inquire into the matters alleged by the plaintiff and dismiss the Amended Complaint; and/or

B. That the court dismiss the Amended Complaint as to Atlantic for failure to state a cause of action; and

C. For the costs and disbursements of this action including reasonable attorney's fees; and

D. For such other and further relief as this court may deem just and proper.

HINDS, COWAN, STRANGE, GEER & LUMPKIN
Attorneys for the Defendant
Atlantic Coast Life Insurance Company
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Georgetown, SC 29442

By:
Peyre T. Lumpkin

Georgetown, South Carolina
October 20, 1994

APPENDIX 17

STATE OF SOUTH CAROLINA	) IN THE COURT
	) OF COMMON
COUNTY OF GEORGETOWN	) PLEAS JUDICIAL
	) CIRCUIT
	) CASE NO.:
	) 93-CP-22-154
Payden Shaw and Juanita Shaw,	)
	)
Plaintiffs,	)
	)
vs.	) **ANSWER**
	)
Atlantic Coast Life Insurance Company,	)
	)
Defendants.	)
	)

The defendant, Atlantic Coast Life Insurance Company Benefit Plan, hereinafter The Plan, answering the amended Complaint, hereinafter Complaint:

FOR A FIRST DEFENSE

1. Denies each allegation of the Complaint herein not admitted, qualified or explained.

2. Upon information and belief admits that the Plaintiffs are residents of Berkeley County, South Carolina and admits that Atlantic Coat Life Insurance Company, hereafter ACLIC, is a corporation licensed to do business in South Carolina and that it does business in Georgetown

County, South Carolina. Further answering paragraph One (1) of the Complaint, The Plan admits that Payden Shaw was an employee of ACLIC working in Georgetown County until he voluntarily quit that employment. Further answering paragraph One (1) of the Complaint, The Plan alleges that Juanita Shaw was not eligible for health benefits because the claim which was denied was for "a condition, disease, illness or injury for which a . . . Dependent received . . . medical care or treatment, or incurred expenses prior to the effective date for Major Medical Expense Benefit under [her] Plan" for which benefits are excluded under the terms of the Plan which exclusion is set forth in the Summary Plan Description (SPD) of the Plan of benefits provided to each employee.

The Plan denies that the Plan is a "group health insurance" plan of benefits and alleges that it is a self-funded plan of benefits funded by contributions from both the participate and ACLIC.

3. Denies the allegations of paragraphs Two (2) of the Complaint and realleges and incorporates herein by reference thereto the final paragraph of paragraph Two (2) above.

4. Denies the allegations of paragraph Three (3) of the Complaint insofar as the allegations refer to

Juanita Shaw as being "fully insured under the described insurance plan" but admits that Ms. Shaw did require medical attention in March of 1991.

5. Denies the allegations of paragraph Four (4) of the Complaint and alleges in further answer thereto that, upon information and belief, the Plaintiffs, if they obtained any preadmission "clearance", obtained "pre-certification" of Juanita Shaw's hospital admission from ValuTrac under §V1-G of the SPD. Pre-certification, as defined in the SPD, is for the purpose of reviewing whether admission is necessary to the care and treatment of illness. It does not guarantee that all charges are covered under the plan of benefits.

6. Answering paragraph Five (5) of the Complaint, the Plan admits that the Plaintiff's made a claim for benefits they allege are owed under the terms of the Plan but The Plan denies such benefits are owed.

7. Denies paragraph Six (6) of the Complaint. Further Answering paragraph Six (6) of the Complaint, The Plan alleges that the Plaintiff's were generally eligible for coverage under the plan of benefits effective February 1, 1991 and that the Plaintiff's made an election to pay their initial monthly contribution for February of 1991 by allowing the employer to deduct the first month's contribution

in four (4) installments in the month preceding the effective date of coverage. The Plan admits that monthly contributions by the Plaintiffs were made for each month following February 1991 until Payden Shaw left the employment of Atlantic Coast Life Insurance Company.

8. Answering paragraph Seven (7) of the Complaint, The Plan admits that the Plan itself does not contain specific information on the employer's allowance of advance installment collection of the first month's contribution for the Plan but alleges that under §IV of the SPD there is notice that funds required of the operation of the Plan are accumulated by means of employee deduction and company contributions.

9. Answering paragraph Eight (8) of the Complaint, The Plan denies that it "failed and refused to honor the contract with it's insureds" but admits that it refused to pay hospitalization and medical bills incurred as a result of the referenced treatment of Juanita Shaw.

10. Denies the allegations of paragraphs Nine (9), Ten (10), and Eleven (11) of the Complaint.

FOR A SECOND DEFENSE

11. That the hospital and medical expenses claimed by the Plaintiffs are excluded pursuant to §V of the SPD as being related to a preexisting condition for which

expenses were incurred as late as January 9, 1991 and for which expenses continued to be incurred at intervals which required the continuous exclusion of expenses for treatment related to this condition for the entire time the Plaintiffs were eligible for Plan benefits.

FOR A THIRD DEFENSE

The Plan alleges:

12. That the Complaint fails to state facts sufficient to constitute a cause of action as it seeks recovery under 29 U.S.C. §1132(a) in the same cause of action, as they seek to recover for breach of contract, a cause of action preempted, superseded, and displaced by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1144(a).

FOR A FOURTH DEFENSE

The Plan alleges:

13. That The Plan Committee is given the discretion to interpret the provisions of the Plan and to determine the rights of the participants under the Plan and that The Plan's decision to deny benefits under the Plan was neither arbitrary nor capricious and did not constitute an abuse of its discretion.

WHEREFORE, having fully answered, The Plan prays that the Court dismiss the Complaint as preempted

and/or because the claim arises from medical expenses related to a pre-existing condition excluded by the terms of the Plan dismiss the Plaintiff's claims including their demand for attorney fees and award The Plan reasonable costs for attorney fees for the defense of this unwarranted claim for benefits.

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Attorneys for the Defendant

Columbia, South Carolina
November 8, 1994.